No. 88-317

IN THE

Supreme Court of the United States

October Term, 1988

JACK R. DUCKWORTH,

Petitioner,

vs.

GARY JAMES EAGAN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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ARGUMENT

I.

THE SEVENTH CIRCUIT'S DETERMINATION THAT EAGAN'S CONFESSIONS WERE NOT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY GIVEN IS IN CONFLICT WITH DETERMINATIONS OF THE U.S. SUPREME COURT AND A MAJORITY OF THE CIRCUIT COURTS ON THIS ISSUE

In formulating a caption to the first division of the argument section of his brief, Respondent clearly indicates his misunder-

standing of the issue at bar and the state of law in this area. First, there is nothing "defective [about a] *Miranda* warning which conditioned Eagan's right to counsel on appearance in court." (Respondent's Brief at 11). Second, Respondent's *right* to counsel was not conditioned on appearance in Court.

Respondent, Eagan, argues that "[P]etitioner and the government of the United States advocate a direct and substantial repudiation of the rights specifically established in *Miranda*." (Respondent's Brief at 17). This is simply incorrect. Rather, Petitioner Duckworth, and the Solicitor General stand four square in support of the principles elucidated in *Miranda* and its progeny, and are requesting this Court apply those principles, an act the Seventh Circuit did not perform.

Petitioner and Respondent are in agreement that advice of rights given an accused may not condition the appointment of counsel on some future event *after* interrogation. *California v. Prysock*, 453 U.S. 355 (1981). The disagreement between the parties arises over the effect of the specific language used.

The advice of rights read to and by Respondent states:

> Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you talk to a lawyer. Joint Appendix at 133.

This advisement of rights consists of eight sentences, three which emphasize Respondent's right to refuse to answer at *any point* in the questioning. Two of the sentences of this advice of rights emphasize Respondent's right to an attorney "*before* we

ask you any questions," and to "*stop answering* at any time until you talk to a lawyer." One of the sentences explains Respondent's right to counsel even if he cannot afford one. The one sentence complained of containing the "if and when" language does not contain any language which conditions appointment of counsel on some point *after interrogation*, and certainly does not imply such when taken in context. It does not violate *Miranda* or *Prysock* to indicate appointment of counsel will take place at a future point in time.[1]

This Court in reviewing *Prysock* determined the Fifth Circuit erred in concluding an advisement of rights was deficient because it failed to *explicitly* inform the accused of his *immediate* right to counsel.

> Here, in contrast, nothing in the warnings given Respondent suggested any limitation on the right to the presence of appointed counsel different from the clearly conveyed right to a lawyer in general, including the right "to a lawyer before you are questioned, . . . while you are being questioned, and all during questioning."
>
> 453 U.S. 355 at 360-361.

Contrary to this well reasoned approach, the Seventh Circuit in *United States ex rel. Williams v. Twomey*, 467 F.2d 1248 (7th Cir. 1972), has adopted formalistic and technical *per se* rules to proscribe specific language used in any advisement of rights. This type of approach was specifically condemned in *California v. Prysock*, 453 U.S. 355 at 359 (1981) as contrary to the spirit and intent of *Miranda* and yet it has again raised its ugly head in this cause.

---

[1] See *Miranda v. Arizona*, 384 U.S. 436, 474 (1966). This does not mean, as some have suggested, that each police station must have a "station house lawyer" present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation. If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time.

Respondent also takes offense at Indiana's apparent lack of any procedural apparatus for appointment of counsel absent an appearance in Court. Yet respondent can point to no decision of this Court which requires any such procedure. Again, any requirement of this procedure was specifically disavowed in *Miranda*. (See, n.1 preceding page).

Respondent blandly asserts "Prior to *Prysock* the majority of courts held the 'if and when' *Miranda* warning to be invalid". (Respondent's Brief at 18). In support of this bold statement, Respondent directs the court's attention to the decisions of twenty three state courts and seven Circuit Courts. The reasoning and the research of Respondent is flawed for several reasons.[2] Ultimately it does not matter whether the majority of state courts or Circuit Courts have reached one determination or another. The question is whether the language of the advice of rights provided Eagan is constitutionally valid pursuant to *Miranda* and subsequent decisions applying the principles set out in *Miranda*. Petitioner believes the Seventh Circuit erred in concluding the advice of rights provided Eagan was constitutionally deficient[3].

[2]First, seven of the state court decisions cited by Respondent do not in fact support his position. The follwing cases relied upon by Petitioner are specifically contrary to Respondent's Position. *Brooks v. State*, 229 A.2d 833 (Del. 1979) (confession admitted based upon a totality of the circumstances); *State v. Carpenter*, 211 Kan. 234, 505 P.2d 753 (1973) (confession admitted based upon totality of circumstances); *State v. Grierson*, 95 Ida. 155, 504 P.2d 1204 (1972) (lineup procedure at issue, confession admitted)

In addition the following cases center on other issues. *State v. Creach*, 77 Wash.2d 194, 461 P.2d 329 (1969) (Advisement of rights was missing necessary language, no "if and when" issue); *State v. Cassell*, 602 P.2d 410 (Alaska 1979) (Advisement of rights was missing language, no "if and when" issue involved. Specifically, referred to *Gaudlow v. State*, 253 Ind. 270, 252 N.E.2d 788 (1969); *Cribbs v. State*, 378 S.2d 316 (Fla. 1988) (issue did not involve "if and when" language); *Moore v. State*, 251 Ark. 436, 472 S.W.2d 940 (1971) (reversed on other grounds with no comment on "if and when" language).

At page 19 of Respondent's Brief, Respondent makes the inaccurate statement "fewer states have found such admonitions to be valid" citing the decisions of ten jurisdictions. Petitioner would also add to the list of jurisdictions upholding the validity of the language at issue, or similar language. *Schlade v. State*, 542 P.2d 907 (Alaska 1973); *Brooks v. State*, 229 A.2d 833 (Delaware 1979); *State v. Carpenter*, 211 Kan. 234, 505 P.2d 753 (1975); *State v. Grierson* 95 Ida. 155, 504 P.2d 1204 (1972). Thus, fourteen state jurisdictions have upheld the language challenged by Respondent and six have not. Similarly, at the Federal level six circuit's have upheld this language and three have declined to do so. The error of Respondents allegation that the majority of Courts have struck down the language challenged in this case is obvious.

[3]Respondent's discussion of federal cases is likewise deficient. Respondent contends the Fifth Circuit has split internally having a decision both affirming and condemning the language at issue. This is not entirely true. The most recent decision of the Fifth Circuit, and thus the most persuasive in terms of precedential value is *United States v. Lacy*, 446 F.2d 511 (5th Cir. 1971) which supports petitioner.

Respondent's attack on Petitioner's reliance on *Cogote v. United States*, 380 F.2d 305, (11th Cir. 1967), *cert denied* 389 U.S. 899 (1969) is misplaced. Respondent contends *Cogote* concerned a "different type of admonition." While the specific language discussed in this case may have differed, the issue was precisely the same. The Court in *Cogote*, defined the issue as follows:

> "The specific complaint here is . . . that appellant was not informed with sufficient clarity of his right to a court appointed attorney at the time the statement was made. Thus, he seems to say in effect that at most the agent advised him only that he could talk to a lawyer before making the statement if he could afford to have one, and that the judge would appoint a lawyer when he came to trial if he could not afford one."

Id. at 307.

Likewise, Respondent's discussion of *Klingler v. United States*, 409 F.2d 299, (8th Cir. 1969), *cert. denied* 396 U.S. 899 (1969) is flawed. According to Respondent, *Klingler* does "not involve a *Miranda* warning which conditioned the right to counsel on some future event." (Respondent's Brief n.3 at 21). The specific language approved in *Klingler* included the following:

> that you do have the right to have an attorney appointed by the Court for you if you are *later* charged with a Federal offense.

Id. at 308

It certainly appears that this language is substantially similar to that Respondent complains of in the case at bar. In approving this language the Eighth Circuit cited with approval *Mayzak v. United States*, 402 F.2d 152 (5th Cir. 1968), which stated:

> "* * * The fact that the F.B.I. agent truthfully informed Mayzak that the F.B.I. could not furnish a lawyer until federal charges were proferred against him does not vitiate the sufficiency of an otherwise adequate warning. * * * *Miranda* * * *

Id. at 155.

If as Respondent has stated these cases do not involve a *Miranda* advisement conditioned on a future event then it is unclear why Respondent objects to the similar language in this case.

Respondent, at pages 21-22 of his brief, asserts the difference of opinion in the Circuits can best be observed by comparing two cases, *Gilpin v. United States*, 415 F.2d 638 (5th Cir. 1969), and *Massimo v. United States*, 463 F.2d 1171 (2nd Cir. 1971), *cert. denied*, 409 U.S. 1117 (1973). Petitioner submits that this is inadequate. When reviewing all of the cases which have discussed this issue, it becomes apparent the difference in result is determined by the difference in approach. Those state courts and Circuit Courts which have applied the "totality of the circumstances" standard, proper to this issue, have generally concluded the type of language complained of herein has not affected the admissibility of a confession. Those courts which have excluded confessions when the "if and when" language has been present have adopted a *per se* approach, which in essence has determined certain "magic words" automatically and in all circumstances render a confession inadmissible. This approach, followed by the Seventh Circuit and the other jurisdiction relied upon by Respondent, does not comport with the clear language or spirit of *Miranda* or its progeny.

II.
THE SEVENTH CIRCUIT ERRED IN DETERMINING THAT EAGAN'S SECOND STATEMENT WAS TAINTED BY AN INADEQUATE ADVISEMENT OF RIGHTS PRIOR TO HIS FIRST STATEMENT

It appears upon close inspection of Respondent's Brief that his actual argument is that no *Miranda* warning complies with the spirit and intent of *Miranda*. At page 23, n.4 of Respondent's Brief, Eagan spends a good deal of time referring to scientific studies which allegedly tend to indicate a substantial number of individuals do not understand any *Miranda* warning, no matter how clear. A logical extension of Respondent's argument is that no advice of rights is clear enough to be understood by an accused, thus, all confessions are inadmissible. This is a clear attack on *Miranda*. This attack on *Miranda* is made all the more clear at pages 41 through 44 of Respondent's Brief, where Respondent attacks the language of the second warning given him as being inadequate.

Respondent's semantical attack on the language of the second advice of rights is simply incorrect. Bereft of authority supporting his claim, Respondent admits the specific language used in the second advice of rights has been approved by the Indiana Supreme Court and the Seventh Circuit. In fact, Respondent's only attack on this second advisement of rights is the order in which the sentences were placed. This issue was addressed in *Prysock* and resolved against Respondent when this Court stated:

> "The Court of Appeals erred in holding that the warnings were inadequate simply because of the order in which they were given.

453 U.S. 355 at 361.

It is obvious from Respondent's arguments with regard to both the first and second advisement of rights that at best he is advocating a rigid technical semantic application of *Miranda* be followed. This position has been specifically rejected by this court on a number of occasions. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Oregon v. Elstad*, 470 U.S. 298 (1985). Alternatively, he argues that any advisement of rights is incapable of being understood thus, all confessions are rendered invalid.

Respondent Eagan's suggestion that this cause should be remanded to the District Court is without merit. First, the District Court denied Respondent's petition for writ of habeas corpus. It is unlikely, therefore, that a review of the supplemental transcript of the suppression hearing will result in any change in the District Court's determination of this issue. Further, the remand of this case is unnecessary and inefficient in that a decision on the legal adequacy of the first or second advisement of rights is dispositive of this case and can quite readily be made by this Court based upon the evidence before it. *Oregon v. Elstad*, 420 U.S. 298 (1985).

CONCLUSION

Based upon the foregoing reasons, Petitioner would respectfully urge this Court to reverse the decision of the

Seventh Circuit and affirm the decision of the District Court denying Eagan's Petition for Writ of Habeas Corpus and dismissing this cause of action.

Respectfully submitted,

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